Supreme Court, U.S.
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No. 00-1610

In The

Supreme Court of the United States

CHARLES TAUNT, TRUSTEE FOR THE BANKRUPTCY ESTATE OF MICHAEL DUANE WILCOX,

Petitioner,

v.

GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT, and the BOARD OF TRUSTEES OF THE GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals properly determined that Michigan law enforces the Detroit city charter's restriction on alienation of city employees' retirement funds and, accordingly, properly excluded the debtor's interest in the City of Detroit defined contribution retirement savings plan from the bankruptcy estate.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding. None of the parties is a corporate entity.

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RELEVANT LAW

11 U.S.C. § 541(c)(2):

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

S. 420, 107th Cong. § 322 (2001):

> Excluding Employee Benefit Plan Participant Contributions and Other Property from the Estate.
>
> (a) In General. Section 541(b) of title 11, United States Code, is amended by inserting after paragraph (6), as added by this Act, the following:
>
> '(7) any amount
>
> '(A) withheld by an employer from the wages of employees for payment as contributions to –
>
> '(i) an employee benefit plan subject to title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 *et seq.*) or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986, a deferred compensation plan under section 457 of the Internal Revenue Code of 1986, or a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986, except that amount shall not constitute disposable income, as defined in section 1325(b)(2) of this title; or

'(ii) a health insurance plan regulated by State law whether or not subject to such title; or

'(B) received by the employer from employees for payment as contributions to –

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'(ii) a health insurance plan regulated by State law whether or not subject to such title.'

Michigan Constitution, Article 7:

§ 22:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

§ 34:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor.

Mich. Comp. Laws § 117.4j(3):

> [T]he exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not, for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.

Charter of the City of Detroit, Title 9, Chap. 6, Art. 9, § 1:

Assignment Prohibited.

The right of a person to a pension, annuity, or retirement allowance, to the return of accumulated contributions, the pension, annuity or retirement allowance itself, any optional benefit, any other right accrued or accruing to any person under the provisions of this chapter and the moneys in the various funds of the retirement system **shall be unassignable and shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency law, or any other process of law whatsoever, except as specifically provided in this chapter.** (As amended September 1, 1961, effective September 15, 1964.) (Emphasis added.)

Michigan Constitution, Article 7:

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> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

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STATEMENT OF THE CASE

This dispute began as an adversary proceeding within the bankruptcy case of Michael Duane Wilcox. To the extent possible, the facts set forth here are quoted from the court of appeals' opinion below, although not necessarily in the same sequence as in the opinion.

A. Factual Background

Mr. Wilcox is an employee of the City of Detroit and a participant in the city's defined contribution retirement plan. The terms of the plan have been effectively incorporated in the city charter adopted by the municipality pursuant to state law home-rule provisions. The plan/city charter provides that Mr. Wilcox's interest is "unassignable" and is not subject to execution, attachment, or the operation of bankruptcy law. The plan permits the withdrawal of funds from Mr. Wilcox's account only upon his death, the termination of his employment, his completion of 25 years of service, or his retirement under a disability. None of these conditions has been met.

Mr. Wilcox entered into a revolving loan agreement with the Detroit Municipal Credit Union with a loan limit of $6,500 in July of 1995.[1] Notwithstanding the anti-assignment provision of the retirement plan, Mr. Wilcox purported to pledge his interest in the plan to the credit union as collateral for the loan.

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[1] The Detroit Municipal Credit Union is an entity separate from the Respondent, The General Retirement System of the City of Detroit.

Mr. Wilcox filed a voluntary petition under Chapter 7 of the Bankruptcy Code on January 31, 1996. He listed his interest in the City of Detroit's defined contribution retirement plan on Schedule B of his bankruptcy schedules. The Petitioner, the bankruptcy trustee, demanded that the Respondent retirement system turn over Mr. Wilcox's entire interest in the plan, which then amounted to $32,141.66.[2] The retirement system responded to the demand by informing the bankruptcy trustee that it could not turn over Mr. Wilcox's interest because, *inter alia*, the retirement plan contained an anti-alienation provision that prohibited such transfers. As a result, the bankruptcy trustee brought this adversary proceeding, seeking to force the turnover of Mr. Wilcox's interest in the retirement savings plan.

B. Procedural Background

No significant discovery was conducted in the adversary proceeding and no evidentiary hearing or trial was held.[3] Instead, both the bankruptcy trustee and the

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[2] Mr. Wilcox initially claimed that his interest in the retirement savings plan was exempt under 11 U.S.C. § 522(d)(10)(E), and the bankruptcy trustee objected. The bankruptcy court issued an "Order Granting the Trustee's Objection to Exemption" stating that the debtor's interest was property of the estate and not exempt under § 522(d)(10)(E). Although the bankruptcy trustee presented the order to the retirement system and demanded the funds, this order did not direct the retirement system to turn over the interest to the bankruptcy trustee as the Sixth Circuit's opinion suggests.

[3] The Petition for a Writ of Certiorari ("Petition") incorrectly states that the retirement system "admitted that it

retirement system moved for summary judgment, each contending that it should prevail as a matter of law. The bankruptcy court heard oral argument on the motions and then issued a memorandum opinion. The bankruptcy court determined that Mr. Wilcox's interest in the retirement plan was not excluded from property of the bankruptcy estate under 11 U.S.C. § 541(c)(2) and granted summary judgment to the bankruptcy trustee. The retirement system appealled to the United States District Court for the Eastern District of Michigan. That court affirmed, and the retirement system appealed to the United States Court of Appeals for the Sixth Circuit, which reviewed the legal issues *de novo* and reversed the district court.

C. The Court of Appeals' Decision

Following *Patterson v. Shumate*, 504 U.S. 753 (1992), the court of appeals conducted a three-part inquiry under § 541(c)(2): First, does the debtor have a beneficial interest in a trust? Second, is there a restriction on the transfer of that interest? Third, is the restriction enforceable under nonbankruptcy law? After noting the absence of any dispute that Mr. Wilcox's interest in the retirement savings

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knew that the plan participants were regularly obtaining loans from the Detroit Municipal Credit Union by granting a security interest in the proceeds of the Plan, even sending out a reminder notice to plan participants advising them that they would send the proceeds of their Annuity Savings Plan to the Detroit Municipal Credit Union if they had taken out a loan." (p. 4) The record contains no such admission and the retirement system consistently maintained that it did not recognize any alienation or assignment of plan funds and that any attempt to assign an interest would be unenforceable.

plan was an interest in a trust or that the anti-assignment provisions of the city charter purported to restrict the transfer of that interest, the court of appeals focused on the third factor. The court of appeals asked whether the incorporation of the anti-assignment provision in the Detroit city charter means that "under applicable non-bankruptcy law" the provision is "enforceable." After reviewing Michigan's constitution, Home Rule Cities Act, and case law, the court of appeals concluded that Michigan courts would not hesitate to enforce the anti-assignment provision in the Detroit city charter. Accordingly, the court of appeals held that the city charter provision was an enforceable, non-bankruptcy law restriction on the transfer of Mr. Wilcox's retirement plan interest. This holding led to the court of appeals' ruling that § 541(c)(2) operated to exclude Mr. Wilcox's retirement plan interest from the bankruptcy estate.

REASONS FOR DENYING THE PETITION

Neither of the two questions raised by the Petitioner is worthy of this Court's review, since the first asserts that the court of appeals' decision creates "intolerable conflict" with another circuit when no real conflict exists, and the second addresses a subject which this Court traditionally declines to review: the proper interpretation of state law. In any event, the entire issue will soon be moot, since pending bankruptcy legislation specifically adopts the retirement savings exclusion that the court of appeals found here.

I. The Petition fails to show a real conflict among the circuits.

The Petition asserts that the decision below "exacerbates a conflict between the circuits[,]" but identifies just one circuit case which purportedly conflicts: *Lowenschuss v. Selnick*, 171 F.3d 673 (9th Cir.), *cert. denied*, 528 U.S. 877 (1999). While its analysis is different, *Lowenschuss* is easily distinguishable on its facts alone and appears to be the classic case of "bad facts, bad law."[4] The court of appeals here recognized that *Lowenschuss* is an aberration and properly declined to adopt its analysis.[5] This does not "create conflict."

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[4] The $ 8 million fund in *Lowenschuss* did not appear to be held in trust at all; these assets were controlled by the debtor, who had transferred them from a purported "pension fund" in Pennsylvania (of which he was the sole beneficiary) to Nevada, in hopes of avoiding a Pennsylvania divorce judgment awarding 38% of the assets to his former wife. The Ninth Circuit Court of Appeals concluded that these funds were part of the bankruptcy estate and, therefore, available to creditors (including, presumably, the debtor's ex-wife).

[5] *Lowenschuss* rejects the straightforward, three-factor approach utilized by other circuits and applies a fourth factor: a requirement that the law restricting transfer must contain a statutory "mechanism" permitting enforcement of the restriction by suit. *Lowenschuss* adopted the since overruled analysis of a bankruptcy court outside its circuit. *See Lowenschuss*, 171 F.3d at 683 (citing *In re Zott*, 225 B.R. 160 (Bankr. E.D. Mich. 1998) (overruled by *Taunt v. Wilcox* (*In re Wilcox*), 233 F.3d 899, 905 (6th Cir. 2000) and *Dettman v. Brucher* (*In re Brucher*), 243 F.3d 242 (6th Cir. 2001)). In *Wilcox*, the Sixth Circuit reviewed *Patterson* and determined that this Court did not graft a fourth factor onto the plain language of § 541(c)(2); on the contrary, *Patterson* relies in part upon *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365 (1990), a case in

The *Lowenschuss* analysis is not used by other circuit courts of appeal which have considered the issue. *See In re Yuhas*, 104 F.3d 612, 614 (3d Cir. 1997); *In re Meehan*, 102 F.3d 1209, 1211-12 (11th Cir. 1997); *Whetzal v. Alderson*, 32 F.3d 1202, 1203-04 (8th Cir. 1994). *Lowenschuss* appears to be limited to its facts even within the Ninth Circuit; for example, the Ninth Circuit Bankruptcy Appellate Panel did not refer to *Lowenschuss* when determining whether a debtor's interest in a municipally-sponsored defined contribution retirement savings plan is excluded from the estate. *See Spacone v. Charleton* (*In re Charleton*), 259 B.R. 158 (9th Cir. B.A.P. 2001).

This Court denied the petition for a writ of certiorari in *Lowenschuss* in 1999, when any "conflict" with the Third, Eighth, and Eleventh Circuits already existed. *Lowenschuss*, 528 U.S. 877 (1999). The Sixth Circuit's agreement with those three circuits in 2000 is no cause to doubt this Court's decision not to review the issue.

II. The Petition asks this Court to review an interpretation of state law, a subject which this Court traditionally declines to review.

Property interests in bankruptcy are matters of state law. *Butner v. United States*, 440 U.S. 48, 55-56 (1979). The Petition asserts that the court of appeals incorrectly applied Michigan law to determine whether a debtor's property interest was part of the bankruptcy estate. A

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which this Court enforced a restriction on transfer without requiring an individual to bring a statutory cause of action for enforcement. *See Wilcox*, 233 F.3d at 905.

determination of state law by a court of appeals "rarely constitute[s] an appropriate subject of this Court's review," *Haring v. Prosise*, 462 U.S. 306, 314 n. 8 (1983), and the Court traditionally refuses to review such issues. *Ragan v. Merchants Transfer & Warehouse Co*, 337 U.S. 530, 534 (1949).

In declining a similar request to review a court of appeals' interpretation of state law determining a debtor's property interest in bankruptcy, this Court explained, "The federal judges who deal regularly with questions of state law in the respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Butner*, 440 U.S. at 57-58. There is no reason to depart from this principle here, as the Petition presents the limited, local law issue of whether a transfer restriction in a city charter is enforceable under a state law.

Incredibly, the Petition's state law analysis omits the Michigan Supreme Court's full enforcement of just such a transfer restriction. In *Wyrzykowski v. Budds*, 37 N.W.2d 686 (Mich. 1949), a judgment creditor attempted to garnish a city employee's pension, and the city objected on the basis of its charter's transfer restriction. The court quashed the garnishment writ because the city was a "home rule" municipality endowed by the state with the "lawful right to create . . . a non-assignable, non-contractual pension with a condition and characteristic of non-garnishability." *Id.* at 735.

The Petition also fails to supply the text of Michigan's Home Rule Cities Act and the related provisions of Michigan's Constitution, which provide that a city's charter IS the law of that city and is given full legal effect

unless: 1) it is preempted by a statute which completely occupies the field that the municipality attempts to regulate; or 2) it directly conflicts with a state statute. Mich. Comp. Laws. § 117.4j(3); Michigan Constitution, Article 7, §§ 22 and 34; *Rental Prop. Owners Assoc. of Kent County v. City of Grand Rapids*, 566 N.W.2d 514, 519 (1997).

Instead of citing relevant state law, the Petitioner cites a bankruptcy court decision for the proposition that the Michigan Supreme Court would not enforce the city charter's anti-alienation provision.[6] The court of appeals properly rejected this case in favor of Michigan cases and laws.

The Petition subtly introduces an argument not raised in the Sixth Circuit. Contending that this municipal retirement plan is only a "contract," the Petition asserts that the Detroit city charter's transfer restriction is a mere contract term unworthy of respect as a law. (Petition, p. 14). The underlying contention is unsupported by authority, and the court of appeals properly gave full legislative effect to the charter's transfer restriction. This Court may safely disregard the argument for the Petitioner's failure to raise it below. *See Equal Employment Opportunity Comm'n v. Fed. Labor Rel. Authority*, 476 U.S. 19, 24 (1986).

III. The issue raised in the Petition will soon be moot.

Any question of whether this type of retirement plan interest should be excluded from the bankruptcy estate under 11 U.S.C. § 541(c)(2) is mooted by the sweeping

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[6] Petition, p.12.

bankruptcy reform bills which passed the House and Senate in March 2001. *See* H.R. 333, 107th Cong. § 323(a) (2001); S. 420, 107th Cong. § 322(a) (2001). The decision below is in accord with the proposed amendment of 11 U.S.C. § 541(b), which *specifically* provides that an employee's contributions to defined contribution plans, *including governmental plans,* are generally excluded from the estate. The retirement savings plan at issue here falls squarely into the category of governmental plans to be excluded from the estate under the proposed amendments. *See id.* (borrowing the definition of "governmental plans" found at 26 U.S.C. § 414(d), which defines a "governmental plan" as one "established and maintained for its employees . . . by the government of any State or political subdivision thereof[.]")[7] Since Congress is in the process of clarifying that the debtor is entitled to exclude retirement plan interest from the estate, as the Sixth Circuit found in this case, no conflict on this issue should arise in the future.

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[7] House-Senate conference committees will reportedly meet soon to reconcile the bills. The provisions quoted here are identical in both bills, so no change need be made. The reforms are expected to pass during this session of Congress, and the President has reportedly indicated that he will sign a bankruptcy reform bill. 87 ABA Journal 83 (May 2001); 2001 Nat'l Journal's Congress Daily, May 2, 2001.

CONCLUSION

For the reasons set forth above, the Respondents request that the Petition be either dismissed or denied.

Respectfully submitted,

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